ONG KENG TAT v. PP

COURT OF APPEAL, PUTRAJAYA
BALIA YUSOF WAHI JCA
ALIZATUL KHAIR OSMAN JCA
HAMID SULTAN ABU BACKER JCA
[CRIMINAL APPEAL NO: K-05-321-11-2011]
6 NOVEMBER 2014

CRIMINAL LAW: *Dangerous Drugs Act 1952 – Section 39B(1)(a) – Trafficking in dangerous drugs – Conviction and sentence – Appeal against – Recovery of dangerous drugs from bag – Customs checkpoint – Whether accused had knowledge of drugs – Conduct of accused – Difference in gross weight of drugs found by raiding officer and chemist – Whether justified – Whether accused an innocent carrier – Whether decision of High Court affirmed*

CRIMINAL PROCEDURE: *Judgment – Double judgment – Brief judgment delivered first – Whether considered as signed written judgment – Criminal Procedure Code, s. 307(3) – Whether contrary to procedural fairness – Federal Constitution, arts. 5 & 8*

The appellant drove through the immigration complex in Bukit Kayu Hitam and was stopped by PW4 at the customs checkpoint. During inspection, a bag ('exh. P57') was found inside the boot of the car. The facts revealed that the appellant pleaded for help and tried to bribe PW4 by offering him some money. PW4, however, refused to accept the money. Later, PW4 contacted PW5, an enforcement officer, who recovered several packages in exh. P57. During the inspection, the appellant was trembling and looked nervous. The appellant tried to bribe PW5 as well by offering him some money and pleaded for the matter to be settled. The appellant was then taken to the Customs Enforcement Unit. There, the assistant raiding officer ('PW6') instructed the appellant to take out one of the packages from exh. P57. After discovering that the package contained white powder, a further examination was conducted where 41 chocolate coloured packages, with a gross weight of 16,135 kilograms, were recovered. The recovered items were then handed over to the customs Senior Assistant Director ('PW7'). It was confirmed by the chemist ('PW2') that the 41 slabs or packages contained heroin. In the High Court, the Judicial Commissioner ('JC') found the appellant guilty for trafficking in dangerous drugs and sentenced him to death. Hence, this appeal. The appellant argued, *inter alia,* that (i) the JC had acted contrary to the requirements of procedural fairness as stipulated in arts. 5 and 8 of the Federal Constitution when two sets of judgments dated 15 November 2011 ('first judgment') and 26 January 2012 were delivered; (ii) there was no *mens rea* possession over the drugs found in exh. P57; (iii) there was doubt as to the identity of the drugs seized since the gross weight of the drugs found by PW2 was higher that the gross weight found by PW6; and (iv) the JC did not consider his defence of being an innocent carrier.

Held (dismissing appeal; affirming conviction and sentence)
Per Alizatul Khair Osman JCA delivering the judgment of the court:

(1) The fact that the brief judgment, *ie,* the first judgment was written, read and recorded did not make it a signed written judgment within the meaning of s. 307(3) of the Criminal Procedure Code (*Yusof Omar v. PP;* foll). Before delivering the brief judgment, the JC had at the outset qualified his brief judgment by stating "Ini adalah keputusan ringkas saya di akhir kes pembelaan". Hence, it was not procedurally wrong for the JC to deliver a brief judgment at the end of the defence case. Besides, the brief judgment was meant for the court to state briefly its reasons for finding the appellant guilty at the end of the defence case. (paras 24, 28 & 30)

(2) The JC relied on both PW4 and PW5's evidence to infer knowledge by way of the appellant's conduct. The appellant tried to bribe PW4 twice even before the drugs were recovered. PW5's evidence corroborated the evidence of PW4 on the appellant's conduct which appeared to be fearful. Further, the appellant attempted to bribe PW5 after some suspicious packages were found in exh. P57. In view of the large quantity of drugs involved, the reasonable inference that may be drawn was that the appellant was in fact carrying it for the purpose of trafficking and not for his own consumption. The JC had therefore rightly made an affirmative finding when he inferred knowledge and *mens rea* possession through the appellant's conduct before resorting to the presumption of trafficking under s. 37(da)(i) of the Act. (paras 33, 34, 36 & 37)

(3) PW7's evidence showed that PW6 used a non-calibrated weighing scale. The difference in the gross weight found by PW6 as opposed to the gross weight found by PW2 was due to the non-calibrated weighing scale. Based on the evidence adduced, the drug exhibits seized and handed to PW7 and examined by PW2 were the same drugs exhibits that were produced before the High Court and upon which the appellant was charged. Thus, there was no break in the chain of evidence that could have created a reasonable doubt as to the identity of the drugs exhibits. (paras 39 & 42)

(4) Although the JC made no reference to the term 'innocent carrier' in his written judgment, it was clear from a perusal of the judgment that the appellant's defence had been considered. Sufficient and credible evidence had been adduced to show that the appellant's conduct was consistent with the knowledge of the presence of the drugs when he tried to avoid, pleaded for help and attempted continuously to bribe PW4 and PW5. As such, the appellant was not an innocent carrier and he knew all along that he was in the process of transporting the drugs from Thailand into Malaysia for the purpose of trafficking. (paras 46 & 47)

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah memandu melalui kompleks imigresen di Bukit Kayu Hitam dan ditahan oleh PW4 di tempat pemeriksaan kastam. Semasa pemeriksaan, satu beg ('eks. P57') telah ditemui di bahagian but kereta. Fakta menunjukkan bahawa perayu telah merayu meminta tolong dan cuba memberi rasuah kepada PW4 dengan menawarkan wang. PW4, walau bagaimanapun, enggan menerimanya. Kemudian, PW4 menghubungi PW5, seorang pegawai peguatkuasa, yang telah menemui beberapa bungkusan dalam eks. P57. Semasa pemeriksaan, perayu menggeletar dan kelihatan takut. Perayu juga cuba memberi rasuah kepada PW5 dengan menawarkan wang kepadanya dan merayu supaya perkara ini diselesaikan. Perayu kemudian dibawa ke stor Unit Penguatkuasaan Kastam. Di situ, penolong pegawai serbuan ('PW6') mengarahkan perayu untuk mengeluarkan satu bungkusan dari eks. P57. Selepas mendapati bahawa bungkusan tersebut mengandungi serbuk putih, pemeriksaan lanjut dilakukan di mana 41 bungkusan berwarna coklat, dengan berat kasar sebanyak 16,135 kilogram, dijumpai. Barang-barang tersebut kemudian diserahkan kepada Timbalan Pengarah kastam ('PW7'). Ahli kimia ('PW2') telah mengesahkan bahawa 41 bahan mampatan atau bungkusan itu mengandungi heroin. Di Mahkamah Tinggi, Pesuruhjaya Kehakiman ('PK') mendapati perayu bersalah atas kesalahan mengedar dadah berbahaya dan telah menjatuhkan hukuman mati ke atasnya. Oleh itu, rayuan ini. Perayu, antara lain, menghujahkan bahawa (i) tindakan PK bercanggah dengan prosedur keadilan seperti yang diperuntukkan di bawah perkara 5 dan 8 Perlembagaan Persekutuan apabila dua set penghakiman bertarikh 15 November 2011 ('penghakiman pertama') dan 26 Januari 2012 telah diberikan; (ii) tiada *mens rea* pemilikan terhadap dadah yang dijumpai dalam eks. P57; (iii) terdapat keraguan terhadap identiti dadah yang dirampas memandangkan berat kasar dadah yang diperolehi oleh PW2 adalah lebih daripada berat kasar yang didapati oleh PW6; dan (iv) PK tidak mempertimbangkan pembelaan perayu bahawa dia adalah pembawa tidak bersalah.

Diputuskan (menolak rayuan; mengesahkan sabitan dan hukuman)
Oleh Alizatul Khair Osman HMR menyampaikan penghakiman mahkamah:

(1) Fakta bahawa penghakiman ringkas, iaitu, penghakiman pertama ditulis, dibaca dan direkodkan tidak menjadikannya satu penghakiman bertulis dalam erti kata s. 307(3) Kanun Tatacara Jenayah. Sebelum menyampaikan penghakiman ringkas tersebut, PK telah pada permulaannya menyatakan "Ini adalah keputusan ringkas saya di akhir kes pembelaan". Oleh itu, tiada kesalahan prosedur oleh PK dalam menyampaikan penghakiman ringkas pada akhir kes pembelaan. Di samping itu, penghakiman ringkas bertujuan supaya mahkamah menyatakan secara ringkas alasannya dalam mendapati perayu bersalah pada akhir kes pembelaan (*Yusof Omar v. PP;* diikuti).

(2) PK telah bersandarkan pada kedua-dua keterangan PW4 dan PW5 untuk membuat inferens pengetahuan melalui tindakan perayu. Perayu telah cuba untuk memberi rasuah sebanyak dua kali kepada PW4 walaupun sebelum dadah dijumpai. Keterangan PW5 telah menyokong keterangan PW4 berkenaan kelakuan perayu yang kelihatan takut. Tambahan lagi, perayu telah cuba untuk memberi rasuah kepada PW5 selepas beberapa bungkusan yang mencurigakan dijumpai dalam eks. P57. Berdasarkan kuantiti dadah yang terlibat, inferens munasabah yang boleh dibuat adalah bahawa perayu telah membawanya bagi tujuan pengedaran dan bukan untuk kegunaannya sendiri. Pesuruhjaya Kehakiman telah membuat penemuan afirmatif yang betul apabila inferens pengetahuan dan *mens rea* milikan dibuat melalui tindakan perayu sebelum membuat anggapan pengedaran di bawah s. 37(da)(i) Akta Dadah Berbahaya 1952.

(3) Keterangan PW7 menunjukkan bahawa PW6 telah menggunakan skala pemberat bukan penentuukur. Perbezaan dalam berat kasar seperti didapati oleh PW6 berbanding dengan berat kasar yang didapati oleh PW2 adalah disebabkan oleh skala pemberat bukan penentuukur. Berdasarkan keterangan yang dikemukakan, eskhibit-ekshibit dadah yang dirampas dan diserahkan kepada PW7 dan diperiksa oleh PW2 merupakan ekshibit-ekshibit dadah sama yang dikemukakan di Mahkamah Tinggi. Oleh itu, tiada pemutusan dalam rantaian keterangan yang boleh membangkitkan keraguan munasabah berkenaan identiti ekshibit-ekshibit dadah.

(4) Walaupun PK tidak membuat rujukan kepada terma 'pembawa tidak bersalah' dalam penghakiman bertulis beliau, adalah jelas bahawa pembelaan perayu telah pun dipertimbangkan. Keterangan yang memadai dan kredibel telah dikemukakan untuk menunjukkan bahawa kelakuan perayu konsisten dengan pengetahuan kewujudan dadah tersebut apabila perayu cuba mengelak, merayu meminta tolong dan mencuba untuk memberi rasuah kepada PW4 dan PW5 secara berterusan. Oleh itu, perayu bukanlah seorang pembawa tidak bersalah dan sepanjang masa sedar bahawa dia dalam proses mengangkut dadah dari Thailand ke Malaysia bagi tujuan pengedaran.

Case(s) referred to:

Chan Pean Leon v. PP [1956] 1 LNS 17 HC ***(refd)***
Hasbala Mohd Sarong v. PP [2013] 6 CLJ 945 FC ***(refd)***
Lim Guan Eng v. PP & Other Appeals [1998] 3 CLJ 769 CA ***(refd)***
Loh Kah Loon v. PP [2011] 5 CLJ 345 FC ***(foll)***
Lorraine Pyhlis Cohen & Anor v. PP [1989] 2 CLJ 131; [1989] 1 CLJ (Rep) 84 SC ***(dist)***
Mohd Johi Said & Anor v. PP [2005] 1 CLJ 389 CA ***(refd)***
Nik Asmawi Nik Daud v. PP [2010] 6 CLJ 400 CA ***(refd)***
Nur Azmi So'aib v. PP [2013] 1 CLJ 563 CA ***(refd)***
Ong Ah Chuan v. PP [1980] 1 LNS 181 PC ***(refd)***

Parlan Dadeh v. PP [2009] 1 CLJ 717 FC ***(refd)***
PP v. Abdul Manaf Muhamad Hassan [2006] 2 CLJ 129l FC ***(refd)***
PP v. Kesavan Petchayo @ Balakrishnan [2000] 1 LNS 235 HC ***(refd)***
Yusof Omar v. PP [2001] 3 CLJ 122 CA ***(foll)***

Legislation referred to:
Courts of Judicature Act 1964, s. 60
Criminal Procedure Code, ss. 307(3), 422
Dangerous Drugs Act 1952, ss. 37(da)(i), 39B(1)(a), (2)
Federal Constitution, arts. 5, 8

For the appellant - Ranjit Singh Dhillon; M/s J Kaur, Ranjit & Assocs
For the prosecution - Kwan Li Sa; DPP

[Appeal from High Court, Alor Setar; Criminal Trial No: MT(4)45A-06-2011]

Reported by Kumitha Abd Majid

JUDGMENT

Alizatul Khair Osman JCA:

[1] The appellant before us was charged and convicted of trafficking in 12,028.4g of heroin under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and punishable under s. 39B(2) of the same.

[2] The charge against the appellant reads as follows:

> Bahawa kamu pada 8 Mei 2010, jam lebih kurang 12.30 tengah hari bertempat di Lorong 4, Unit Khas Pemeriksaan Penumpang, Kompleks Imigresen Bukit Kayu Hitam, dalam Daerah Kubang Pasu, dalam Negeri Kedah Darul Aman, telah memperedarkan dadah berbahaya sejumlah berat 12028.4g Heroin dan oleh yang demikian, kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

Salient Facts

[3] The facts of this case have been comprehensively set out in the grounds of judgment of the learned Judicial Commissioner.

[4] They are briefly as follows.

[5] On 8 May 2010 at about 12.30pm, the appellant was driving a dark green Wira bearing registration number KAQ 6618 through the Immigration Complex, Bukit Kayu Hitam. He was stopped at the customs checkpoint by Abdul Halim Bin Ismail (PW4) and was asked to open the boot of the car. Inside the boot of the car, PW4 found a bag with a trolley (exh. P57). Upon examining the bag (exh. P57), PW4's suspicions were aroused and he requested his colleague to assist him. At this juncture, the appellant pleaded for help and tried to bribe PW4 by offering him a wad of RM50 notes. This

A was ignored by PW4 who refused to take the money and instead took the appellant's car keys to prevent him from running away. Later, PW4 contacted one Khamis bin Kamal (PW5) an enforcement officer with the Bahagian Penguatkuasaan Kastam who came over to assist him.

B **[6]** PW5 examined the boot of the car and recovered a bag (exh. P57) containing several chocolate coloured packages. PW5 directed the appellant to go into the car and asked for his identity card. At that moment the appellant was trembling and he looked nervous and frightened. He then tried to bribe PW5 with a wad of RM50 notes and pleaded for the matter to be settled. PW5 then called another customs officer, one Jayadevan to handcuff
C the appellant.

[7] PW5 took the appellant's car keys from PW4 and brought the appellant and his car to the store of the Customs Enforcement Unit, Bukit Kayu Hitam. At the store, PW5 telephoned the Senior Assistant Director of Customs, Mohamad Marzuki bin Ahmad (PW7) to inform him about the
D incident. He also informed the officer on duty, one Md Nor bin Hamid (PW6) about the arrest of the appellant and the seizure of the car.

[8] PW6 came to the store and directed the appellant to take out exhibit P57 from the boot of the car and place it on the table. He then directed the
E appellant to take out one of the packages from the bag. PW6 discovered that the package contained white powder. PW6 immediately reported the matter to PW7 who then directed PW6 to carry out further examination and to prepare a report.

[9] PW6 then instructed PW5 and Jayadevan to examine exh. P57. From
F exh. P57 they recovered 41 chocolate coloured packages. PW6 only opened the first package. All 41 packages were weighed and the gross weight was found to be 16.135kg. PW6 then handed over the appellant together with the recovered items to PW7. PW6 lodged a police report at 5.30pm on the same day.

G **[10]** The exhibits (all 41 slabs or packages) were sent by PW7 to the Chemistry Department for analysis on 13 May 2010. The chemist (PW2) who conducted the analysis found the 41 slabs to contain 12,028.4g of heroin.

Findings Of The High Court At The Close Of The Prosecution Case

H

[11] At the close of the prosecution's case, the court found that the prosecution had succeeded in proving a *prima facie* case against the appellant.

[12] On the issue of possession His Lordship following *Chan Pean Leon v. PP* [1956] 1 LNS 17; [1956] MLJ 237 found firstly, that the evidence before
I the court gave rise to the inference that the appellant had custody and control of the drugs in question. This was how the learned Judicial Commissioner put it:

[13] Dadah berbahaya jenis heroin tersebut telah dijumpai di dalam boot kereta Wira KAQ 6618 yang sedang dipandu oleh OKT pada masa beliau ditahan. Dadah ini berada di dalam beg P57. Beg ini tidak berkunci. OKT berada bersama dengan SP4 dan SP5 ketika SP4 dan SP5 memeriksa kereta dan beg tersebut. Begitu juga semasa pemeriksaan di setor bahagian penguatkuasaan OKT ada bersama. Keterangan ini menunjukkan OKT secara langsungnya mempunyai kawalan dan jagaan ke atas kesemua 41 bungkusan yang terdapat di dalam kereta tersebut. Keterangan ini telah menimbulkan inferens bahawa secara fizikalnya OKT mempunyai kawalan dan jagaan ke atas dadah berbahaya tersebut.

[13] Secondly, on the issue of knowledge or *mens rea* possession the learned Judicial Commissioner relied on the evidence of PW4 and PW5 to infer knowledge by way of the appellant's conduct as can be seen from the following passage of His Lordship's judgment:

[16] ... Keterangan SP4 dan SP5 tentang penawaran wang ini boleh diterima dan boleh dipercayai oleh mahkamah. Ketinggalan SP6 menyebut perkara tersebut di dalam laporan beliau tidak menimbulkan keraguan tentang perbuatan OKT menawarkan wang kepada SP4 dan SP5 ...

[19] Keterangan-keterangan mengenai kelakuan-kelakuan OKT yang relevan di dalam kes ini iaitu percubaan beliau menghalang pemeriksaan beg, meminta tolong dan penawaran wang oleh OKT kepada kedua-dua saksi relevan adalah relevan dan boleh diterima di bawah s. 8 Akta Keterangan 1952. Keterangan ini membawa inferens bahawa OKT tahu bahawa terdapatnya dadah berbahaya di dalam beg tersebut dan dengan yang demikian cuba menghalang SP4 dari memeriksanya. Selepas dadah tersebut dijumpai oleh SP4 dan SP5, OKT cuba untuk mengelak diri dengan cara membuat penyelesaian dengan kedua-dua saksi ini dengan memberi wang kepada mereka. Di dalam keadaan biasa OKT tidak akan mencuba menghalang orang yang mempunyai tugas perundangan menguatkuasakan undang-undang dan peraturan dari melakukan perkara sedemikian jika mereka tidak tahu terdapat barang yang menyalahi undang-undang di dalam beg yang beliau bawa tersebut. Begitu juga OKT tidak akan cuba membuat penyelesaian dengan SP4 dan SP5 jika beliau tidak tahu ketulan yang terdapat di dalam beg tersebut adalah dadah berbahaya yang telah mendedahkan beliau kepada satu kesalahan yang berat.

[14] Thus His Lordship found upon a maximum evaluation of the evidence, in particular the evidence of PW4 and PW5 that:

Melalui keterangan ini pihak pendakwaan telah berjaya membuktikan OKT mempunyai pemilikan ke atas dadah berbahaya jenis heroin secara fizikal dan OKT mempunyai pengetahuan tentang dadah berbahaya tersebut.

[15] His Lordship was also satisfied that based on the chemist's report the prosecution had proved that the contents of the 41 slabs or packages were dangerous drugs, to wit, heroin.

[16] The learned Judicial Commissioner also found that the presumption of trafficking under s. 37(da) of the DDA was correctly invoked by the prosecution.

[17] Based on his findings above, the learned Judicial Commissioner found a *prima facie* case had been established against the appellant and he called on the appellant to enter his defence.

Appellant's Defence And Court's Finding At The Close Of The Defence Case

[18] The defence of the appellant was that he had no knowledge that the bag (exh. P57) left by his brother in the car contained drugs. Essentially his defence was that the bag, exhibit P57 belonged to his brother and he was framed by his brother.

[19] We will deal with the appellant's defence in greater detail in the later part of this judgment.

[20] The learned Judicial Commissioner found the appellant's defence that his brother, Ong Keng Loon framed him improbable and failed to cast a reasonable doubt on the prosecution's case. The appellant's defence in short, was a bare denial. The appellant was therefore found guilty, convicted and sentenced to death.

[21] Hence this appeal.

The Appeal

[22] The appellant raised numerous grounds of appeal in his petition of appeal. However, before us learned counsel for the appellant, Mr Ranjit Singh Dhilon confined himself to four issues only namely:

(i) Whether there were two sets of judgment, one dated 15 November 2011 and the second dated 26 January 2012;

(ii) Whether the learned Judicial Commissioner was right in holding that the appellant had *mens rea* possession over the drugs found in exh. P57;

(iii) Whether there is doubt as to the identity of the exhibit as the gross weight of the drugs as found by the chemist (PW2) was higher than the gross weight found by the assistant raiding officer (PW6); and

(iv) Whether the appellant's defence of innocent carrier had been sufficiently considered.

(i) *Whether There Were Two Sets Of Judgment, One Dated 15 November 2011 And The Second Dated 26 January 2012*

[23] Learned counsel for the appellant argued that there were two sets of judgments in this case. The first judgment dated 15 November, 2011 which can be seen at pp. 85 to 86 Vol. 1 of the appeal record whereas the second

judgment dated some two months later on 26 January 2012, is set out at pp. 88 to 102 Vol. 1 of the Appeal Record. Learned counsel relied on the Supreme Court decision of *Lorraine Pyhlis Cohen & Anor v. PP* [1989] 2 CLJ 131; [1989] 1 CLJ (Rep) 84; [1989] 2 MLJ 288 to contend that it is wrong in principle to allow a judge to supplement his original written judgment by a second judgment.

[24] Learned counsel for the appellant contended that in supplementing his first judgment with a second judgment, the learned Judicial Commissioner had acted contrary to the requirements of procedural fairness as envisaged by art. 5 and art. 8 of the Federal Constitution which could not be cured under s. 422 of the Criminal Procedure Code ('CPC') or s. 60 of the Courts of Judicature Act 1964 ('CJA').

[25] The alleged "first judgment" on 15 November 2011 was delivered by the learned Judicial Commissioner following submissions by the prosecution and defence on 16 October 2011 after the close of the defence case on 2 October 2011. Before delivering his brief judgment on 15 November 2011, the learned Judicial Commissioner had at the outset qualified his brief judgment by stating as follows:

> Ini adalah *keputusan ringkas* saya di akhir kes pembelaan.
> (Emphasis added)

[26] In *Lim Guan Eng v. PP & Other Appeals* [1998] 3 CLJ 769, Gopal Sri Ram JCA (as he then was) had occasion to deliberate on the foregoing issue and his view was as follows:

> ... We are equally satisfied from a careful scrutiny of the record of appeal that nothing really turns upon the note made by the learned judge on 28 April 1997 which refers to a "draf keputusan" (literally meaning "draft decision"). What he was obviously referring to were the points he jotted down when delivering his oral reasons for finding the appellant guilty. These do not, in our opinion, amount to a judgment in the sense in which it is used by the Courts of Judicature Act 1964, the Criminal Procedure Code and the Rules of the Court of Appeal 1994 which primarily govern adjectival criminal law. The judgment of the trial judge in this case was, without doubt, the full written reasons he furnished to the parties after notices of appeal had been lodged and which was erroneously dated 28 February.

[27] Based on the aforesaid principle there is therefore a distinction between "keputusan ringkas" which in our case is what the "first judgment" clearly is and "written judgment", which is the "second judgment" here.

[28] In this regard, the observations of the Court of Appeal in the case of *Yusof Omar v. PP* [2001] 3 CLJ 122 at p. 136 is particularly apposite:

> ... Kami berpendapat bahawa bukanlah "salah" ("wrong") atau salah aturan bagi Hakim Makamah Sesyen itu memberi alasan-alasan mengapa beliau memanggil perayu membela diri. Malah itu adalah satu amalan yang baik. Demikian juga jika seseorang hakim bicara itu berbuat demikian

A semasa memberi keputusan di akhir kes, jika beliau tidak sempat menulis alasan penghakiman lengkap di peringkat itu. Kami juga berpendapat adalah tidak 'salah' atau salah aturan jika hakim-hakim bicara membuat catatan dan membacanya semasa memberi alasan-alasan mengapa mereka memanggil tertuduh membela diri atau sebaliknya atau mendapatinya bersalah atau sebaliknya. Ini untuk mengelak kesilapan yang mungkin
B berlaku. Kami juga berpendapat bahawa adalah tidak 'salah' atau salah aturan jika alasan-alasan itu kemudian ditaip sebagai sebahagian daripada nota keterangan. Bahawa ianya ditulis, dibaca dan direkodkan tidaklah menjadikannya suatu alasan penghakiman yang ditandatangani di bawah s. 307(3) KAJ. Maka soal "dua alasan penghakiman" tidak timbul.

C **[29]** Following *Yusof Omar v. PP*, we are of the view that it is not procedurally wrong for the learned Judicial Commissioner to give a brief judgment at the end of the defence case. The brief judgment is meant for the court to state briefly its reasons for finding the accused (the appellant in this case) guilty at the end of the defence case.

D **[30]** As succinctly put by the Court of Appeal (*supra*):

> Bahawa ia ditulis, dibaca dan direkodkan tidaklah menjadikannya satu alasan penghakiman yang ditandatangani di bawah s. 307(3) KAJ.

[31] In other words the fact that the brief judgment (or first judgment in this
E case) was written, read and recorded did not make it a signed written judgment within the meaning of s. 307(3) of the Criminal Procedure Code.

[32] Hence, the issue of two written judgments did not arise here. The case of *Lorraine Pyhllis Cohen & Anor v. PP* is distinguished.

F (ii) *Whether The Learned Judicial Commissioner Was Right In Holding That The Appellant Had Mens Rea Possession Over The Drugs Found In Exh. P57*

[33] PW4 saw the appellant was driving a motorcar bearing registration number KAQ 6618 ("the said car") when he arrived at the Bukit Kayu Hitam customs checkpoint and all along till his arrest, PW4 and PW5 confirmed
G the appellant was alone. The proscribed drugs were found in the boot of the car inside exh. P57 and judging by the proximity of the appellant to the drugs, it was clearly deducible that he was found to be in physical custody and control of the drugs.

(see para. 13, p. 93, vol. 1, appeal record – reproduced at p. 5 of this
H judgment (*supra*)).

[34] As stated earlier, the learned Judicial Commissioner had relied on the evidence of PW4 and PW5 to infer knowledge by way of the appellant's conduct. For ease of reference the evidence of PW4 is reproduced below:

I Pada pukul 12.20 tengah hari, saya ketika itu bertugas di unit pemeriksaan penumpang shift tengah hari. Kelihatan kenderaan sesak kerana lorong pemeriksaan kastam hanya dibuka dua sahaja iaitu lorong 2 dan 3. Saya

cuba selesaikan masaalah dengan membuka lorong 4. Pada masa yang sama saya mengarahkan sebuah kenderaan Wira berwarna hijau gelap untuk memasuki lorong 4 untuk dibuat pemeriksaan. Saya mengarahkan kenderaan itu untuk berhenti untuk dibuat pemeriksaan tetapi pemandu kenderaan itu terus memandu dan saya terpaksa menepuk di bahagian boot belakang kenderaan itu sambil menjerit "berhenti".

Kenderaan itu berhenti di luar kawasan yang ditetapkan untuk pemeriksaan. Saya mengarahkan pemandu kenderaan wira itu untuk membuka boot dan turun dari kenderaannya untuk diadakan pemeriksaan bersama. Pemandu turun dari kenderaannya dan berada di belakang boot bersama saya. Saya terus membuka boot kenderaan itu sambil diperhatikan oleh pemandu. Saya memulakan pemeriksaan dengan memeriksa bungkusan beg plastik yang di dalamnya mengandungi pengalas kaki. Seterusnya saya beralih untuk memeriksa sebuah beg tetapi pemandu cuba menepis tangan saya sambil berkata "*tiada apa-apa encik*". Saya memasukkan tangan saya ke dalam beg besar itu yang telah terbuka separuh zipnya sambil meraba-raba dan terasa ada ketulan lalu saya mengangkat sedikit dan saya berpaling kepada pemandu sambil bertanya "*barang apa ini?*".

Beliau hanya meminta tolong kepada saya. Dalam masa yang sama dia mengeluarkan segumpal duit yang saya tak pasti jumlahnya tapi yang saya pasti not RM50 dan mengacu kepada saya sambil meminta tolong. Dia juga cuba berjalan ke arah kenderaan bahagian pemandu tapi saya memegang tangannya sambil berkata "*berhenti*". Melihat keadaan pemandu yang takut dan terketar-ketar saya arahkan pemandu untuk masuk ke dalam kereta di bahagian tempat pemandu dan saya matikan enjin kereta dan mengambil kunci. Saya kemudian menjerit ke arah pegawai kastam iaitu Abu yang berada di lorong berhampiran iaitu lorong 2 untuk memanggil Pegawai Kastam Bahagian Penguatkuasaan yang berada di sekitar.

Dalam masa yang sama pemandu sekali lagi meminta tolong sambil mengeluarkan duit dari kocek hadapan dan cuba memberikan kepada saya. ...

[35] It can be seen from the above evidence that the appellant tried to bribe PW4 twice even before the drugs were recovered. The evidence of PW5 corroborated the evidence of PW4 on the conduct of the appellant which appeared to be fearful. The appellant attempted further to bribe PW5 after some suspicious packages were found carefully wrapped in exh. P57. This is reflected in PW5's evidence which was as follows:

Saya bertanya kepada Encik Halim ada apa dan Encik Halim berkata pergi tengok sendiri dekat boot kereta sebab orang ini mencurigakan. Pada masa itu, Halim bawa keluar pemandu ke boot kereta dan saya membuka boot dan ada nampak sebuah beg pakaian bertroli. Bila saya buka beg tersebut, ada kain penutup berzip dan bila saya selak kain berzip tersebut saya nampak beberapa bungkusan berwarna coklat. Pada masa itu saya terkejut dan berkata pada Halim "mungkin ini bungkusan dadah".

A Saya mengarahkan pemandu tersebut masuk semula ke dalam kereta dan meminta IC. Semasa dia beri kad pengenalan kepada saya, dia dalam keadaan tangan menggeletar dan berpeluh dan mukanya juga berpeluh seperti orang ketakutan. Saya ambil kad pengenalan tersebut dan simpan dalam poket baju. Pada masa itu juga saya nampak dia memegang duit RM50 beberapa keping dan menghulurkan kepada saya dan berkata "kita selesai".

B

[36] In the case of *PP v. Kesavan Petchayo @ Balakrishnan* [2000] 1 LNS 235, the evidence of PW3 showed that the accused, upon being stopped and the package taken from him, had gone on his knees, held on to PW3's leg, wept and sought to explain the packages did not belong to him. These events took place even before the drugs were found. Abdul Wahab Patail J (a High Court Judge then) held, at p. 9:

C

The fact that he looked shocked and went on his knees to 'minta tolong' is damning evidence that he had knowledge of the contents of the two envelopes.

D **[37]** On the evidence available and based on established principles of law on the applicability of evidence of conduct to infer knowledge (see the Federal Court case of *Parlan Dadeh v. PP* [2009] 1 CLJ 717), it is our judgment that the learned Judicial Commissioner had rightly made an affirmative finding when he inferred knowledge and '*mens rea* possession' through the E conduct of the appellant before resorting to the presumption of trafficking under s. 37(da)(i) of the Act.

[38] In the instant case, each slab of the drugs in question had been carefully wrapped to avoid detection in the transporting process. Unfortunately, the appellant was stopped at the customs checkpoint. PW4 F and PW5 saw that the appellant was desperately attempting to bribe them fully aware of the consequences if he were to be arrested. In view of the large quantity of drugs involved, the reasonable inference that may be drawn is that the appellant was in fact carrying it for the purpose of trafficking and not for his own consumption. (The cases of *Ong Ah Chuan v. PP* [1980] 1 LNS G 181; [1981] 1 MLJ 64 and *PP v. Abdul Manaf Muhamad Hassan* [2006] 2 CLJ 129l; [2006] 3 MLJ 193 are referred).

(iii) *Whether There Is Doubt As To The Identity Of The Exhibit As The Gross Weight Of The Drugs As Found By The Chemist (PW2) Was Higher Than The Gross Weight Found By The Assistant Raiding Officer (PW6)*

H

[39] Counsel for the appellant alleged that there is doubt as to the identity of the drugs seized. It was argued that the gross weight of the drugs found by the chemist was higher than the gross weight found by PW6 which was 16,188.9g compared to 16,135g as found by the latter. Thus, there was a difference of 53.9g between the gross weight of the drug exhibits as found by I PW2 and PW6. Learned counsel for the appellant submitted that the difference in the weight of the drugs seized is a material discrepancy. The difference in the weight of the drugs meant that by the time the exhibits reached the chemist, its gross weight had increased.

[40] The evidence of PW7 shows that PW6 had used a non-calibrated weighing scale. We agreed with the learned prosecutor's submission that the difference in the gross weight as found by PW6 as opposed to the gross weight found by PW2 is due to the non-calibrated weighing scale.

[41] In any event, as observed by Raus Sharif PCA in *Loh Kah Loon v. PP* [2011] 5 CLJ 345, at para. 17 of p. 353:

> ... on the facts of this case, the difference in the weight of the exhibits as found by the police and the chemist, by itself cannot be said to have created doubt as to the identity of the exhibits. The real question is whether the exhibits recovered by the police is the same exhibits sent to and examined by the chemist and subsequently produced in court as evidence. We have no doubt that it was the same exhibits.

[42] According to the prosecution, *Loh Kah Loon* (*supra*) was referred to (and affirmed) by the Federal Court in its recent decision of *Hasbala Mohd Sarong v. PP* [2013] 6 CLJ 945 (FC Criminal Appeal No: 05-87-05-2012 (B)).

[43] In this case, PW6 and PW7 confirmed and identified all the exhibits. The drugs identified were those drugs found in exh. P57 and PW6 took into possession those drugs from the appellant at the store. The exhibits were subsequently marked by both PW6 and PW7 before they were handed over to PW2 for chemical analysis. The same exhibits were returned to PW7 and kept in his safe keeping pending disposal of the trial. Applying *Loh Kah Loon* (*supra*), we have no doubt that, based on the evidence adduced, the drug exhibits seized and handed to PW7 and examined by PW2 were the same drug exhibits that were produced before the High Court and upon which the appellant was charged. There was no break in the chain of evidence that could have created a reasonable doubt as to the identity of the drugs exhibit.

(iv) *Whether The Appellant's Defence Of Innocent Carrier Had Been Sufficiently Considered*

[44] Learned counsel for the appellant argued that the learned Judicial Commissioner failed to direct his mind to the appellant's defence that he was an innocent carrier. In deliberating the defence of being framed, the learned trial judge was merely speculating and did not produce any facts to back his conjecture. Learned counsel relied on these authorities *viz*; *Nur Azmi So'aib v. PP* [2013] 1 CLJ 563; [2012] 2 AMR 112, *Nik Asmawi Nik Daud v. PP* [2010] 6 CLJ 400 and *Mohd Johi Said & Anor v. PP* [2005] 1 CLJ 389, in support of his contention.

[45] In the present case, the appellant gave evidence on oath. He gave evidence that he was not the registered owner of the car and the car belonged to his brother, Ong Keng Loon. At the material time he was asked by his sister to get the motorcar from Ong Keng Loon. The appellant went just short of the border and met his brother at Bukit Kayu Hitam duty free shop. Having taken the motorcar, his brother directed the appellant to wait for him

at the Immigration check point as he needed to collect some items from his girlfriend. It was his brother who left behind the bag in the motorcar. The appellant denied having knowledge of the bag's contents and he was merely an innocent carrier for Ong Keng Loon.

[46] The learned Judicial Commissioner after going through in detail the defence's story concluded as follows:

> [27] Saya perlu pertimbangkan samada pembelaan OKT boleh diterima atau tidak dan dipercayai atau sebaliknya. Pembelaan OKT menimbulkan beliau telah dianiaya oleh abangnya, Ong Keng Loon. Pembelaan ini jika diterima dan dipercayai *akan menimbulkan keraguan bukan sahaja tentang pengetahuan OKT mengenai dadah yang terdapat dalam beg* tersebut malah kawalan dan jagaan OKT terhadap dadah berbahaya itu sendiri. Sebaliknya jika pembelaan beliau dipercayai saya masih perlu pertimbangkan di dalam keadaan manakah pembelaan ini telah menimbulkan keraguan yang munasabah terhadap kes pendakwaan. Selepas mempertimbangkan pembelaan OKT tentang pemilikan dadah, saya mendapati pembelaan ini tidak boleh dipercayai. Adalah tidak munasabah untuk abang beliau mengenakan beliau sehingga menyebabkan beliau dikenakan pertuduhan dengan satu kesalahan yang berat. Kita perlu ingat pertuduhan terhadap OKT membawa hukuman mati mandatori dan agak tidak logik abang OKT, Ong Loon sanggup mengenakan beliau dengan kesalahan sedemikian rupa. Pembelaan OKT ini tentang peranan abangnya menganiayai beliau tidak munasabah dan tidak boleh dipercayai malah tidak dapat menimbulkan keraguan munasabah terhadap kes pendakwa bahawa OKT mempunyai pemilikan ke atas dadah berbahaya tersebut. Walaupun OKT gagal menimbulkan keraguan yang munasabah terhadap pemilikan, OKT masih berhak dibebaskan jika pembelaan beliau dapat menyangkal anggapan statutori pengedaran dadah di bawah s. 37(da)(i) tersebut. Tugas ini adalah pada tahap di atas imbangan kebarangkalian. Keterangan pembelaan tidak merujuk secara khusus penyangkalan anggapan ini. Oleh yang demikian OKT bergantung kepada pembelaan yang sama untuk menyangkal anggapan statutori ini. Keseluruhan pembelaan OKT ini tidak lebih dari satu pembelaan yang diada-adakan. Pembelaan sebegini di dalam keadaan biasa tidak akan menimbulkan keraguan yang munasabah terhadap kes pendakwaan. (Emphasis added)

[47] In our view, although in this case no reference is made by the learned Judicial Commissioner to the term 'innocent carrier' in his written judgment it is clear from a perusal of his judgment above (in particular the emboldened part of the judgment) that the learned Judicial Commissioner had considered the appellant's defence.

[48] Sufficient and credible evidence had been adduced to show that the appellant's conduct was consistent with the knowledge of the presence of drugs when he tried to avoid, pleaded for help and attempted continuously to bribe PW4 and PW5. We find that the appellant was not an innocent carrier and he knew all along that he was in the process of transporting the drugs from Thailand into Malaysia for the purpose of trafficking.

Conclusion

[49] From the totality of the evidence adduced we are satisfied and we agree with the finding of the learned Judicial Commissioner that there is ample evidence to support the necessary inference that the appellant had the control and custody of the drugs. The appellant had not rebutted the presumption of trafficking under s. 37(da) of the Act nor has he succeeded in raising any reasonable doubt on the prosecution's case.

[50] It is our view that the conviction was safe and proper.

[51] We therefore dismiss the appellant's appeal and affirm his conviction and sentence.